

Remarks

1. Summary of the Office Action

In the Final Office Action mailed March 4, 2009, the Examiner rejected claims 9-11 under 35 U.S.C. § 103(a) as being unpatentable over United States Patent Publication No. 2002/0181394 (Partain) in view of United States Patent Publication No. 2003/0182430 (Aalto) and further in view of United States Patent No. 6,690,678 (Basso). The Examiner rejected claim 12 under 35 U.S.C. § 103(a) as being unpatentable over Partain, in view of Aalto, further in view of Basso, and further in view of United States Patent No. 5,764,645 (Bernet) and United States Patent No. 5,404,537 (Olnowich). The Examiner rejected claim 13 under 35 U.S.C. § 103(a) as being unpatentable over Partain, in view of Aalto, further in view of Basso, further in view of Bernet, further in view of Olnowich, and further in view of United States Patent Publication No. 2005/0117511 (Tsujiimoto). The Examiner rejected claims 14 and 15 under 35 U.S.C. § 103(a) as being unpatentable over Partain, in view of Aalto, further in view of Basso, further in view of Bernet, further in view of Olnowich, further in view of Tsujimoto, and further in view of United States Patent Publication No. 2004/0071133 (Yusko). The Examiner rejected claim 16 under 35 U.S.C. § 103(a) as being unpatentable over Partain, in view of Aalto, further in view of Basso, further in view of Bernet, further in view of Olnowich, further in view of Tsujimoto, further in view of Yusko, and further in view of United States Patent No. 6,950,947 (Purtell).

2. Request for Continued Examination

A Request for Continued Examination under 37 C.F.R. § 1.114 has been included with this response. Accordingly, Applicant requests the withdrawal of the finality of the last Office Action and request further consideration of the attached amended claims on the merits.

3. Status of the Claims

Applicant has herein amended independent claims 9 and 12, and have amended dependent claims 10, 11, and 13-16. New claims 17-23 are currently added. Currently pending are claims 9-23, of which claims 9, 12, and 21 are independent and the remaining pending claims are dependent.

4. Response to the Office Action with Respect to the Examiner's Rejections

As noted above, the Examiner rejected claims 9-11 35 U.S.C. § 103(a) as being unpatentable over Partain, in view of Aalto, and further in view of Basso.

a. The cited prior art references of Partain and Olnowich fail to disclose the claim limitations “restricting the new data link” and “delaying the new data link,” respectively.

In the last Office Action, the Examiner relied exclusively upon the Partain reference for reading on the claim limitation requiring the “restricting the new data link according to the determined function and the assigned priority of the first application...”

In regard to claim 9, as amended, Applicant submits that the Partain reference merely discloses aborting the creation of the new data link, not “delaying the establishment of the new data link for a first period of time,” as required by amended claim 9.

Applicant notes that the Examiner rejected a similar limitation in regard to un-amended claim 12 by exclusively relying upon the Olnowich reference (See pages 9-10 of the Office Action). First, the cited portion of the Olnowich reference (column 16, lines 12-24) is directed to halting an already established connection. In contrast, claim 9 requires the “delaying of the establishment” of a new data link. Second, the cited portion of the Olnowich reference discloses the halting of existing lower priority data connections. In contrast, claim 9 requires “delaying the establishment of” a new data link having an equal or higher priority than existing data connections “having a priority level less than” the new data link priority level.

M.P.E.P. § 2142 requires an Examiner to clearly articulate reasoning with rational underpinnings to support the conclusion of obviousness. In this case, the Examiner cited, and exclusively relied upon, the Partain and Olnowich references for propositions that each does not disclose. Consequently, the Examiner did not establish *prima facie* obviousness of the independent claim 9. Therefore, Applicant submits that the independent claim, and all claims dependent thereon, are allowable.

b. The cited prior art reference of Basso fails to disclose the claim limitations “determining assigned priorities of the existing data links” and “at least part of any data traffic which is assigned to applications with lower priority of the first application is considered ... to be free channel capacity”.

Applicant notes that the Examiner conceded on pages 4-5 of the Office Action that Partain fails to disclose any specifics regarding the transmission medium capacity (“Partain only determines whether the link is congested.”) The Examiner also conceded that Partain fails to disclose “determining assigned priorities of existing links”, and fails to disclose wherein “at least part of any data traffic which is assigned to applications with lower priority than the priority of the first application is considered” to be free channel capacity. Instead, the Examiner exclusively relied upon the Basso reference for disclosing “determining assigned priorities of the existing data links” and “at least part of any data traffic which is assigned to applications with lower priority of the first application is considered ... to be free channel capacity.” (See pages 5-6 of the Office Action).

Applicant submits, however, that the cited portions of the Basso reference do not disclose treating lower priority data links “as free channel capacity,” as required by the claims. Rather, as set forth in Column 14, lines 39-49, the Basso reference explicitly does not characterize the bandwidth being consumed by data traffic (PVCs) as free channel capacity. The Basso reference explicitly states that an active change (re-allocation) of the bandwidth allocated to the PVCs must be executed prior to the bandwidth currently being consumed by the PVCs to be considered free channel space available for voice services (SVCs). As set forth in Col. 17, lines 55-59, this process is executed by a Bandwidth

Adjustment process that periodically re-adjusts bandwidth levels based on PVC and SVC reservation levels. It is not until after the bandwidth being consumed by the PVCs is re-allocated is the freed bandwidth considered free channel capacity.

M.P.E.P. § 2142 requires an Examiner to clearly articulate reasoning with rational underpinnings to support the conclusion of obviousness. In this case, the Examiner cited, and exclusively relied upon, the Basso reference for a proposition that the reference does not disclose. Consequently, the Examiner did not establish *prima facie* obviousness of the independent claim 9. Therefore, for at least this reason also, Applicant submits that the independent claim, and all claims dependent thereon, are allowable.

c. The cited prior art reference of Basso fails to disclose the claim limitation “a maximum threshold level of capacity currently allocated to data links having a priority level less than the first priority level is defined at the first station, and applied in determining free channel capacity”.

In specific regard to claim 11, Applicant notes that the Examiner exclusively relied upon the Basso reference for disclosing the consideration of a “threshold” amount “corresponding to a relative fraction of the data traffic which is assigned to applications with a lower priority” as being considered “free channel capacity.” For at least the reasons noted above regarding Basso’s failure to consider any portion of the data traffic (PVCs) as free until it is actually de-allocated by a bandwidth adjustment process, Applicant submits that the Examiner has failed to assert a *prima facie* case of obviousness. Additionally, even if Basso did disclose what the Examiner purports the reference to disclose, Basso does not disclose any threshold value that would prevent the system of Basso from consuming the entire available channel capacity with voice services (SVCs) at the expense of data services (PVCs), as required by the claim limitations of claim 11. For at least this reason also, Applicant submits that the Examiner has failed to assert a *prima facie* case of obviousness with regard to claim 11.

M.P.E.P. § 2142 requires an Examiner to clearly articulate reasoning with rational underpinnings to support the conclusion of obviousness. In this case, the Examiner cited, and

exclusively relied upon, the Basso reference for a proposition that the reference does not disclose. Consequently, the Examiner did not establish *prima facie* obviousness of the dependent claim 11. Therefore, Applicant submits that the dependent claim 11 is allowable.

d. The cited prior art reference of Olnowich fails to disclose the claim limitations “communicating a message to the first station ...” and “at least temporarily suspend[] the new data link after receiving the message”.

As noted above, the Examiner rejected claims 12-16 under 35 U.S.C. § 103(a) as being as being unpatentable over Partain, in view of Aalto, further in view of Basso, and further in view of two or more of Bernet, Onowich, Tsujimoto, Yusko, and Purtell.

In regard to independent claim 12, Applicant submits that the cited art of record fails to render claim 12 obvious for at least the reasons cited above in regard to claim 9. Furthermore, Applicant submits that the cited Olnowich reference, exclusively relied upon by the Examiner for disclosing the claim limitation “communicating a message to the first station ...” and “at least temporarily suspend[] the new data link after receiving the message.” The Examiner cites to column 15, line 59-column 16, line 24 of Olnowich as disclosing this limitation. However, Applicant submits that the cited portion of Olnowich fails to disclose the sending of a message from one station to another to suspend a data link. At most, the cited portion of the Olnowich reference discloses pausing the sending of a message, but fails to disclose how that pausing is effectuated.

e. The Examiner has failed to assert evidence of obviousness in regard to claim 12, and each claim depending on claim 12, as required by *KSR v. Teleflex*.

Additionally, Applicant respectfully submits that the Examiner has failed to set forth sufficient evidence regarding how or why one of ordinary skill in the art would have modified the system of Partain in light of the systems of Aalto, Basso, Bernet, and Olnowich, as cited by the Examiner. *KSR International Co. v. Teleflex Inc.* requires that an Examiner provide "some articulated reasoning with some rationale underpinning to support the legal conclusion of obviousness." *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, ___, 82 USPQ2d 1385, 1396 (2007). An Examiner must "identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does," *Id.* The mere fact that references can be combined or modified does not render the resultant combination obvious unless the results would have been predictable to one of ordinary skill in the art. *Id.* The Examiner must make "explicit" this rationale of "the apparent reason to combine the known elements in the fashion claimed," including a detailed explanation of "the effects of demands known to the design community or present in the marketplace" and "the background knowledge possessed by a person having ordinary skill in the art." *Id.* at 1389. The rationale must be free of the distortion caused by hindsight bias and may not rely on ex post reasoning. *Id.* at 1397. Anything less is not sufficient to sustain a prima facie case of obviousness. *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329 (Fed. Cir. 2006).

Here, the Examiner has rejected claim 12 in light of five references, with a mere conclusory statement on page 10 of the Office Action that "It would have been obvious to one of the ordinary skill in the art at the time of the invention to modify the system of Partain using features, as taught by Aalto, Basso, Bernet, and Olnowich in order to allow application of higher priority level to establish connections over those of lower priority level." This statement fails to meet the standards of articulated reasoning and rationale underpinning required for each combination by *KSR*.

For example, many of the cited references disclose conflicting methods of ensuring access to and quality of service of a transmission medium. The Examiner has failed to set forth why one of ordinary skill in the art, in reviewing a particular access and/or quality of service method of one reference, would look for additional access and/or quality of service methods in other references, or how seemingly conflicting access and/or quality of service methods could be integrated to form a final cohesive method or apparatus.

For example, the Examiner cites the Bernet reference on page 9 of the Office Action to read on the claim limitation requiring the establishment of a new data link “without regard for the current utilization of the medium.” Subsequently, the Examiner cites the Olnowich reference as a combination reference for its purported disclosure of “communicating a message” and “temporarily suspending the new data link.” (See pages 9-10 of the Office Action). However, column 15, line 55-column 16, line 2 of Olnowich clearly teaches that a new data link is always established with regard for the current utilization of the medium.

Applicant notes that the Court of Appeals for the Federal Circuit has held that “[a] prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984). Furthermore, “[i]t is improper to combine references where the references teach away from their combination.” *In re Grasselli*, 713 F.2d 731, 743, 218 USPQ 769, 779 (Fed. Cir. 1983). Finally, Applicant submits that an obviousness rejection is improper if the proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose. *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984).

For at least the reason that the Olnowich reference, when considered in its entirety, teaches away from the claimed invention, it is improper for the Examiner to utilize the Olnowich and Bernet. Furthermore, if the references were combined in the manner recited by the Examiner, the Olnowich

and/or Bernet inventions would be rendered unsatisfactory for their intended purpose.

Applicant submits that similar arguments could be made for many of the remaining references.

5. Conclusion

Applicant submits that the pending claims 9-23 are in condition for allowance and respectfully requests favorable reconsideration and allowance of all of the pending claims. Should the Examiner wish to discuss this case with the undersigned, the Examiner is invited to call the undersigned at (312) 913-2125.

Respectfully submitted,

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